MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force (Task Force)
FROM: Gerald Mueller
SUBJECT: Summary of the January 7, 2008 Task Force Meeting
DATE: January 7, 2008

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Harvey Hackett	Bitterroot
Gail Patton	Sanders County Commissioner
Fred Lurie	Blackfoot Challenge
Nate Hall	Avista
Caryn Miske	Flathead Basin Commission
Matt Clifford	Clark Fork Coalition
Ted Williams	Flathead Lakers
Arvid "Butch" Hiller	Mountain Water
Jim Dinsmore	Upper Clark Fork
Steve Hughes	Joint Board of Control & Lake County
Marc Spratt	Flathead Conservation District/Flathead Chamber of Commerce

Staff:

Curt Martin	DNRC
Gerald Mueller	Consensus Associates

Meeting Agenda

- November 5, 2007 Meeting Summary
- Updates
  - Water Policy Committee Interim Committee
  - Basin Water Supply and Growth Conference
  - Hungry Horse Water Activities
  - •Water Right System Policy Paper
- Next Steps
- Public Comment
- Next Meeting

November 5, 2007 Meeting Summary

The Task Force made no change to the October 1, 2007 meeting summary.

Updates

Water Policy Committee Interim Committee (WPIC) - Legislative staff of WPIC has changed. Joe Kolman has replaced Krista Lee Evans, who took a job outside of state government. WPIC meets next on January 15 - 16, 2008 in Hamilton. Gerald Mueller passed out a copy of the agenda for the meeting. On Friday, January 4, 2008, copies of drafts of eight separate pieces of legislation were posted on WPIC's web site, http://leg.mt.gov/css/lepo/2007_2008/water_policy/default.asp. WPIC will discuss these drafts at its Hamilton meeting. The topics of the legislation are: an accelerated permitting process, a notice of intent to drill, water right enforcement, ground water quality, a water reservation for the Montana Department of Transportation, the existing disconnect in subdivision and water right permitting, a data study through the Montana Bureau of Mines and

Geology, and adjudication issue remarks. Since he did not discover the bill drafts until the morning of this meeting, Mr. Mueller did not have time to analyze all of them. He did briefly review for the Task Force the bill drafts concerning the accelerated permitting process, a water reservation for the Montana Department of Transportation, and the adjudication issue remarks. Mr. Mueller passed out copies of the bills concerning water right enforcement and the subdivision and water right disconnect because they address topics related to past Task Force discussions. The enforcement bill would create a new division of water rights enforcement within DNRC headed by a state engineer. It would charge the new division with the responsibility for the administrative enforcement of water rights and for administratively preventing the unauthorized use of water. The division would also employ water commissioners. The new division would be assigned enforcement responsibilities now exercised by the courts. The second bill draft would seek to eliminate the disconnect between subdivision and water right permitting by final plat by requiring that approval for a subdivision may not be granted unless the applicant submits evidence that a permit to appropriate water has been obtained. Mr. Mueller noted that all of these bills are only drafts that have not yet been discussed by WPIC. He asked if the Task Force wanted to take a position on any of them at the January WPIC meeting.

Question - What is the significance of the WPIC consideration of these bills?
Answer - Because WPIC is a interim committee established by the legislature, bills that it approves are introduced before the next legislature as committee bills rather than by individual legislators. Once introduced, they follow the normal legislative process, i.e., they are heard by a committee in one house which can then send them to the full legislative body. Upon passage by one body, the bills would then be transmitted to the other body. They would again be assigned to a committee which can pass them to the full body.

Comment - Some of these bills are responding to issues the Task Force has raised. It is good that WPIC is considering them. Through WPIC, we have our best opportunity to influence their content.

Comment - Substituting DNRC for the enforcement role now played by district courts is a very significant change. Often change of this magnitude require more than one legislative session to pass.

Comment - The subdivision bill is also a major change. Under current law, the maximum amount of time required to receive final platt approval is four years. Requiring water rights permits prior to final platt approval could delay subdivision approval beyond four years because of the time that may be needed to resolve objections to water right applications.

Comment - The proposed subdivision bill would increase the incentives for developers to avoid community wells which require water rights permits in favor of individuals wells less than 35 gallons per minute and ten acre feet per year which do not require permits.

Task Force Action - Because the bill drafts only became available one business day prior to this meeting, the Task Force decided that rather than taking a position regarding any of them now, it would consider them its next meeting in February. It asked Mr. Mueller to summarize the bills and to report on WPIC's January deliberations at the February Task Force at the meeting.

Basin Water Supply and Growth Conference - Mr. Mueller passed out the latest version of the agenda for the conference, including the list of speakers. See Appendix 1. All have confirmed their willingness to speak except for Rep. Cohenour, Bruce Measure, and a Tribal representative. Mr. Measure has a potential conflict that he is attempting to address. Mr. Mueller will talk with Rep. Cohenour at the WPIC meeting. Mr. Mueller stated that the Task Force needs to begin to

advertise the conference soon. He has contacted the Montana State Bar and the Board of Professional Engineers & Land Surveyors (BPEL) about continuing legal education credits. The State Bar has a form to submit, but the BPEL does not certify events in advance. The Montana Society of Engineers (MSE) does so for a $50 fee. Mr. Mueller stated that he is waiting to confer with Dr. Shively about conference details including the registration fee before applying to the State Bar. Mr. Mueller asked if he should submit an application MSE.

Comment - The purpose of the conference is to educate decision makers about water resources and provide them with tools to conduct the management.

Comment - The target audience should include the conservation districts, county planners and planning board members, and Realtors.

Comment - Please check to see if a digital recording can be made of the conference so that it can be available via the internet.

Comment-– We should ask the conference speakers to provide an outline of their talk that we can make available to registrants at or before the conference.

Task Force Action - The Task Force agreed that Mr. Mueller should submit the application to the State Bar and MSE for certification for continuing education credits. He should also seek continuing education credits from the Montana Board of Realtors

Hungry Horse Water Activities - Curt Martin and Gerald Mueller reported. Mr. Martin stated that DNRC has not formally requested that the Bureau of Reclamation (BOR) begin the cost reallocation study funded by the last legislature. Given the letters of support from several of the basin's counties, Mr. Tubbs is ready to trigger the request soon. Mr. Mueller attended the negotiation session for the water rights compact between the state and the Confederated Salish and Kootenai Tribes held in Pablo on December 12. At that session, a BOR spokesperson stated that money is available to conduct modeling related to use of Hungry Horse water as part of the compact. One way to approach the input data necessary to conduct this modeling would be to assume water from Hungry Horse would be released to irrigate all additional irrigable acres in the basin, which apparently are largely confined to the Reservation, plus additional water to meet the domestic needs of a growing basin population.

Comment - Although we have heard that the BOR may be willing to contract to supply water from Hungry Horse directly with water users, it does not appear that it will do so without going through the complete contracting process including an environmental impact statement.

Comment - One way that some or all of the contract process might be circumvented is through a compact between the state and the Tribes that is approved directly by Congress.

Comment - Even a compact probably could not eliminated constraints on the operation of Hungry Horse imposed by the Endangered Species Act.

Comment - While a compact may offer procedural advantages, it is too early to abandon the contracting process.

Comment - At the December compact negotiating session, state spokesman seemed optimistic about the possibility of reaching an agreement based on the Tribes offer of a joint approach to water management. Tribal spokespersons have expressed the desire to have a compact negotiated by October or November of this year.

Comment - Another reason for optimism is the progress that has been made concerning administration of the Flathead Irrigation Project (FIP). The Tribes have apparently agreed to a coordinated management entity consisting of four members appointed by the Joint Board of Control and four members appointed by the Tribal Council. This coordinated management entity would hire the system manager and staff. Ownership of FIP would remain with the Bureau of Indian Affairs.

Comment - The Tribes have also apparently agreed to a single priority date for water rights associated with allotted and fee lands within the Flathead Irrigation Project. No decision has been made about what the date would be.

Task Force Action - The Task Force agreed to ask DNRC to develop scenarios for future basin water use that could be used as input to BOR modeling. The scenarios would specify how much, when, and where water would be needed. One scenario should be an upper bound on water use. DNRC should present the scenarios to the Task Force before providing them to the BOR.

Water Right System Policy Paper

The Task Force reviewed the preliminary draft paper dated December 2007. See Appendix 2. A summary of some of the comments and questions on the paper follows. Mr. Mueller will revise the paper and circulate the revised draft to the Task Force prior to its next meeting in February.

- The paper should avoid stating opinions.
- References to forces changing the prior appropriations should be dropped in favor of a statement about challenges due to increased competition for the resource and increasing management complexity.
- Reference to a domestic use priority should be deleted.
- Rather than a focus on ground water exemptions, the paper should explore ways for ensuring water to domestic users.
- The 1972 Constitution contains other provisions that may affect water management. The language in Section 3, Unalienable Rights, states, "They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities." Life's basic necessities may include the right to domestic use of water.
- Ground water rights do not include the right to unchanged conditions as does surface rights.
- After stating that water is the only natural resource that the state claims to own, consider explaining the situation with minerals.
- The statement that "Montana law does not provide for conjunctive management or enforcement of surface water and ground water rights" is too strong. Case law does provide for conjunctive management.
- In the section on ground and surface water interactions, note that adverse effect is not defined and the difference between physical and legal availability.
- The paper should discuss the importance of irrigation seepage for domestic water supplies.

Task Force Action - The Task Force agreed to consider adding recommendations to the paper after members have a chance to digest its contents. Recommendations will be considered at the next meeting.

Public Comment

There was no additional public comment.

Next Meeting

The next meeting was scheduled for Monday, February 4, 2008. The meeting will begin at 9:30 a.m. and end at 2:00 p.m. Lunch will be provided. The agenda will include discussion of WPIC bill drafts, the water supply and growth conference, and the water right system policy paper.

Appendix 1

Water Supply and Growth in the Clark Fork River Basin

A Conference Cosponsored by:
Clark Fork River Basin Task Force
Montana Association of Counties
Montana Department of Natural Resources and Conservation
Montana Department of Environmental Quality
University of Montana Department of Geography

Purpose
To explore the basic facts and issues regarding the water supply and growth in the Clark Fork River Basin.

Dates
March 10 and 11, 2008

Place
University of Montana, Missoula, Montana

Target Audience
Tribal and local government officials (county commissioners, mayors, and tribal and city council members) and staff (city managers, city/county/tribal planners, etc.), state and tribal water management and planners, consultants, water users (irrigation districts, hydropower operators, water utilities, etc.), fish and wildlife managers, conservation/environmental organizations, academics (faculty and students), and interested public.

Agenda
Day 1 - Setting the Stage

11:00 am Registration

1:00 pm Welcome and Introduction - Gerald Mueller, Clark Fork Task Force Facilitator

1:15 pm Water law primer - Holly Franz, ESQ, Clark Fork Task Force Member
- State ownership and allocation of water
- First-in-time, first-in-use
- Tribal water rights

1:30 pm Basin water supply facts - Marc Spratt, Clark Fork Task Force Member & RLK Hydro)
- Clark Fork River basin water balance -
  - Historic (surface water)
  - Recent (ground water)
  - Basin water storage (present uses and constraints)
  - Water short and water rich areas of the basin

2:00 pm Recent legal rulings - Candice West, ESQ, Chief Legal Council, Montana

Department of Natural Resources and Conservation (DNRC)
- Thompson River Cogeneration water
- TU vs. DNRC

2:20 pm Break

2:35 pm Basin population and economic growth
- Demographics - Susan Ockert, Montana Department of Commerce Census and Economic Information Center
- Economy - Dick King, President/CEO, Missoula Area Economic Development Corporation

3:05 pm Basin Water use projection - Tim Bryggman, DNRC Water Management Bureau Economist

3:25 pm Discussion
- Conference participant questions and comments

4:00 pm Social and No-host bar

Day 2 - Growth and Water Supply Planning and Regulation

8:00 am Registration and Continental Breakfast

8:30 am Welcome and Introduction - Gerald Mueller

8:35 am Who Makes What Decision in Planning for Growth - David Shively, Associate Professor of Geography, University of Montana, Moderator
- County growth policies, zoning, subdivision regulations, and critical area ordinances - Myra Schultz, ESQ
  - What authority do they provide counties to regulate water supply?
- State subdivision regulations - Steve Kilbreath, Section Supervisor, Subdivision Review Program, Montana Department of Environmental Quality
  - How do they relate to water supply?
- Ideas for improving growth planning and management - Michael Kakuk, ESQ and Tim Davis, Project Manager, Montana Smart Growth Coalition
- Implications of HB 831 - Michael Nicklin, Ph.D., P.E., Nicklin Earth & Water
- Participant questions and comments

10:00 am Break

10:15 am Managing the Water Supply
- DNRC water right regulation - Bill Schultz, DNRC Regional Water Resources Manager
  - Water availability analysis (physical and legal)
  - Coordinated surface and ground water regulation
  - Ground water permit exemptions
- Participant questions and comments

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10:45 am Water Management Issues - Arvid Hiller, Vice President and General Manager, Mountain Water Company, Moderator

- Individual or community water and septic systems, what is in the public interest? - Jim Carlson, Director of Environmental Health, Missoula County Environmental Health Department and Steve Kilbreath, DEQ
- Exempt Wells - Rep. Jill Cohenhour (Invited)
  - Should ground water wells be exempt from water right permits?
  - Which ones should be exempt?
- Well Driller Perspective on Ground Water Development - Bill Gardner (Invited)
- Aquifer Storage and Recovery - Randy Overton, RLK Hydro
  - What is it?
  - Who regulates it?
  - How does it impact on Public water supplies
- Participant questions and comments

Noon Lunch - Senator Jim Elliott, Chairman of the Water Policy Interim Committee.

1:00 pm Potential Sources of Water for Growth

- New Sources - Mike McLane, Water resources Specialist, Montana Department of Fish, Wildlife and Parks
  - Ground water
  - Existing water rights
  - Hungry Horse contracts
- Constraints on Hungry Horse operation - Bruce Measure, ESQ, Montana Member of the Northwest Power and Conservation Council (Invited)
- State-Confederated Salish and Kootenai Tribal compact - Tribal representative (invited)
- Participant questions and comments

2:00 pm Break

2:15 pm Improved Local, State, and Tribal Water Supply and Growth Planning - Participants will break into facilitated groups to discuss needs and ideas for improving planning and coordination

3:00 pm Improved Local, State, and Tribal Water Supply and Growth Planning - Full group discussion

4:30 pm Wrap Up - Matt Clifford, ESQ

5:00 pm Adjourn

PRELIMINARY DRAFT - DECEMBER 2007

Appendix 2

Status of the First-In-Time, First-In-Right Water Right Allocation and Management System

Although it did not begin this way, today's Montana water law is based on the prior appropriation doctrine which is commonly summarized by "first-in-time, first-in-right." [1] First-in-time, first-in-right means that water use is based on water rights with a priority determined by when water was first put to a beneficial use. Forces are at work, however, that are moving water allocation and management away from this system. These forces include: a groundwater permit exemption that is creating an unofficial domestic use priority, administrative and enforcement challenges that threaten the viability of water rights, groundwater development that impacts surface water, and federal statutes and regulations that constrain the operation of federal water projects and river flow. This paper is prepared by the Clark Fork River Basin Task Force (Task Force)[2] to review the status of Montana's water allocation and management system and then to examine the forces that are changing it.

History of Montana Water Allocation and Management

Pre-1973

Prior to the passage in 1973 of the Montana Water Use Act, the right to use water in Montana was obtained simply by putting it to a beneficial use.[3] No central compilation of water rights existed. Resolution of water right disputes and adjudication of water rights occurred in local courts in actions brought by individuals.[4]

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[1] In 1894, the Montana Territorial Legislature established the riparian doctrine as the means of allocating water. In this system, title to water is granted to landowners whose property is adjacent to rivers and streams. It was not until 1921 that the Montana Supreme Court rejected the riparian system in favor of prior appropriation. See Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005.

[2] The Clark Fork River Basin Task Force was created in 2001 pursuant to a state statute, 85-2-350 MCA. This statute requires that members of the Task Force be representative of the water interests and sub-basins in the Clark Fork River basin. It charged the Task Force with developing a water management plan for the basin that identified options to protect the security of water rights and provided for the orderly development and conservation of water in the future. The Task Force presented the *Clark Fork Basin Watershed Management Plan* to Montana's governor and legislature in September 2004. The *Plan* was subsequently adopted by the Montana Department of Natural Resources and Conservation into the State Water Plan. For more information about the Task Force see http://dnrc.mt.gov/wrd/water_mgmt/clarkforkbasin_taskforce/default.asp.

[3] Stone, *Selected Aspects of Montana Water Law*, 1978, page 28.

[4] In 1903, the Montana Legislature established the Montana State Engineer's Office and charged the State Engineer with surveying the state's water systems to determine annual flows and with overseeing implementation of an 1894 federal statute that allowed private companies to develop irrigation systems. In 1934, the Legislature created the Montana State Water Conservation Board (SWCB) and authorized it to investigate and fund water storage and irrigation projects. In 1965, the Legislature abolished the Montana State Engineer's Office. Two years later, it replaced the Montana State Water Conservation Board with the Montana Water Resources Board (MWRB) and directed it to prepare a state water plan. See Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005. According to Shovers, the same 1967 statute required "...that all water-right holders must make a declaration of their appropriation to their county clerk, who, in turn, would forward them to the board in Helena to be compiled into a comprehensive inventory of water resources." The Board did not compile a comprehensive inventory. Neither the State Engineer, SWCB, nor MWRB had the authority to resolve water right disputes or adjudicate water rights. This authority remained in local courts.

Post 1973

In 1972, Montanans adopted a revised Constitution. Article IX, Section 3 of the new Constitution included several provisions regarding water and water rights. It recognized and confirmed existing water rights, asserted that "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people...," subjected state waters "...to appropriation for beneficial uses as provided by law," and required the legislature both to "...provide for the administration, control, and regulation of water rights and ... establish a system of centralized records, in addition to the present system of local records." In response to latter directive, the Montana legislature passed the Montana Water Use Act in 1973. This Act established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized through a state-wide water rights adjudication in state courts. It also provided that a new water right or a change to an existing right requires a permit from the Montana Department of Natural Resources and Conservation (DNRC).[5]

Adjudication

To facilitate the state-wide water right adjudication, the legislature passed SB 76 in 1979. SB 76 mandated a comprehensive adjudication of all pre-1973 water rights in a newly created Montana Water Court. It also created the Montana Reserved Water Rights Compact Commission and charged it with negotiating federal and tribal reserved water rights.[6] Twenty-five years later, the Water Court had issued six decrees that are sometimes labeled as final, but will have to be re-opened.[7] A major reason for the slow pace of the adjudication was insufficient staff and funding for the DNRC to carry out its claims examination responsibilities.[8] In 2005, the legislature passed a water rights fee to increase funding to DNRC and the Montana Water Court in an attempt to complete the adjudication by 2020. By 2007, DNRC had hired XX additional staff and was on pace to complete its examination work by 2015. Also, by 2007, the Montana Water Court had XX temporary decrees that it determined to be enforceable.

Surface Water Appropriations

Historically, under the prior appropriation doctrine, Montanans obtained water for new uses by acquiring new surface water rights. However, by 2007 the era of new surface water rights supporting new uses was essentially over. Most of Montana's major river basins were closed to new surface water rights, with specific exceptions for some uses. The closed basins included: the

[5] *Water Rights in Montana*, published by the Montana Department of Natural Resources and Conservation, the Legislative Environmental Quality Council, and the Montana University System Water Center, February 2006, page 3.

[6] Federal reserved water rights were created by the United States Supreme Court in its ruling in Winters v. United States [206 U.S. § 564 (1908)]. The Supreme Court held that when Congress or the President sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, National Park, or National Forest, a quantity of water is impliedly reserved which is necessary to fulfill that primary federal purpose. A federal reserved water right has a priority date as of the date the land was withdrawn and the reservation was created; it cannot be lost through nonuse.

[7] *See* Mont. Code Ann. § 85-2-237 (reopening and review of decrees).

[8] "White Paper on the Montana Water Rights Adjudication" issued by the Upper Clark Fork River Basin Steering Committee on March 2, 2004, page 8.

upper Missouri, Jefferson, Madison, Teton, upper Clark Fork, Bitterroot, and the Musselshell. The sources of water in the Milk River basin were closed. A recent DNRC ruling had effectively closed the Clark Fork River basin to new surface water rights.[9] Several individual creeks were also closed during a portion of each year. Water right compacts with federal agencies and Indian tribes had closed certain water sources to new appropriations.[10] The reason for these closures was the recognition that these basins have no more surface water to appropriate for new water rights. Even in areas not closed, a new surface water right would be the most junior for a given water source. The new user would have "wet" water only after all other senior rights are satisfied. Basing significant economic activity on a new junior water right would likely be a risky proposition.

The 1973 Water Use Act allowed state or federal agencies or political subdivisions of the state to apply to the Board of Natural Resources and Conservation to reserve water for present and future beneficial uses, including instream flows and water quality.[11] Reservations were granted for the upper Missouri River basin, i.e. the basin above Ft. Peck Reservoir, and the Yellowstone River basin.[12] No provision has been made in other Montana basins to reserve water for future use.

The end of the era of new surface water rights means that new water uses will depend on one or more of four mechanisms: changes to existing water rights, purchases of existing rights, contracting for stored water, or using ground water. Ground water will be discussed in the next section of this paper. The efficacy of changes to or purchases of existing rights depends on two things: completion of the water right adjudication so that one can be confident in the status of a pre-1973 water right and the user friendliness of the administrative system for changing water rights. While some water may be available from privately or state owned reservoirs and other water bodies, the most likely source of storage for new water uses is the large federally owned reservoirs: Fort Peck, Tiber, Canyon Ferry, Hungry Horse, Koocanusa, and Yellowtail. Contracts from these reservoirs will also be discussed below.

Ground Water Appropriations

Montana first began to regulate ground water development in 1961 when the legislature passed a ground water code establishing a system for appropriating ground water.[13] This code allowed DNRC to "... administratively close a ground water aquifer to further appropriation or to restrict or condition existing or future ground water allocations on the basis of water quality concerns by

[9]See the Final Order issued by DNRC denying Application No. 76N-30010429 by the Thompson River Lumber Company.

[10]For a complete listing of closures created by statute, administrative action, and compact, see *Water Rights in Montana*, February 2006, pages 36-40.

[11]Draft Environmental Impact Statement, Upper Clark Fork Basin Water Reservation Applications, Montana DNRC, December 1988, page 1 -2.

[12]Donald MacIntire, "The Prior Appropriation Doctrine in Montana," *Montana Law Review, Volume 55, No. 2,* Summer 1994, page 322.

[13]"Managing Montana's Water" at http://water.montana.edu/pdfs/headwaters/headwaters6.pdf, page 4. Prior to the effective date of the ground water code, January 1, 1962, ground water could be appropriated only if it flowed in a "permanent, defined, and known channel." See Doney, *Montana Law Handbook*, published by the State Bar of Montana, October 1981, page 134.

establishing a controlled ground water area."[14] The 1973 Water Use Act required DNRC permits for ground water developments in excess of 100 gallons per minute. In 1991, the legislature recognized the significance of ground water as a supply for Montana water users and passed the Montana Ground-Water Assessment Act establishing the Montana Ground Water Assessment Program to characterize and monitor the state's ground water and conduct long-term, statewide monitoring of ground water quality and water levels.[15] Also in 1991, the legislature changed the definition of wells exempt from DNRC water right permits to 35 gallons or less per minute and 10 acre-feet per year or less.[16]

Federal Storage Reservoirs

Beginning in the 1930s and continuing through the 1970s, the federal government constructed several large dams and reservoirs in Montana. In order of construction, these were the Fort Peck, Hungry Horse, Canyon Ferry, Tiber, Yellowtail, and Libby Dams. The agencies charged with operating these dams, the United States Bureau of Reclamation (BOR) and the United States Army Corp of Engineers (COE) filed water rights with the state claiming the right to store water to market it to water users for various purposes.[17] In response to concerns about the marketing of Montana water for industrial purposes, especially for coal slurry pipelines, the 1983 Montana legislature created the Select Committee on Water Marketing (Committee). In response to recommendations from the Committee,[18] the 1985 legislature created a state water leasing program for the purposes of limiting the total amount of water that the state could lease and providing revenue to the state. The limit was 50,000 acre-feet. The Committee recommended and the legislature authorized the state to obtain water for any beneficial use from existing federal reservoirs, Fort Peck, Hungry Horse, Canyon Ferry, Tiber, and Yellowtail, provided that the state had an agreement between the state and federal government to share the revenue from marketing the water.[19] The state negotiated a contract with the COE for Fort Peck water, but did not market any of it. This contract expired in 19XX, and was not renewed.

In 2007, the Task Force successfully sought legislation to raise the cap from 50,000 to 1,000,000 acre-feet on the amount of water that the state can lease for beneficial uses when the source of the water is a federal reservoir and when the water leased is not used to transport water out of the basin in which the reservoir is located. The legislation also eliminated the requirement that water marketing revenue be shared between the state and federal government. The Task Force sought this legislation to use Hungry Horse water to provide for future water uses in the Clark Fork River

[14] Donald MacIntire, "The Prior Appropriation Doctrine in Montana," *Montana Law Review, Volume 55, No. 2,* Summer 1994, page 322.

[15] http://www.mbmg.mtech.edu/grw/grwassessmemt.asp.

[16] Curt Martin, "Wells Exempt from the Permitting Process", unpublished paper presented to the Legislative Interim Water Policy Committee on September 13, 2007.

[17] COE constructed and operates Fort Peck and Libby Dams, and BOR constructed and operates Hungry Horse, Canyon Ferry, Tiber, and Yellowtail Dams.

[18] *Summary of the Report of the Select Committee on Water Marketing to the 49th Legislature*, January 1985.

[19] 85-2-141(3) MCA.

basin and to protect uses of water in the basin that are junior to lower basin hydroelectric water rights.[20]

Forces Changing the Prior Appropriation System

Ground Water Permit Exemption

As previously mentioned, since passage of the 1973 Water Use Act, certain ground water developments have been exempt from DNRC permit requirements. Current law provides that:

> Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring with a maximum appropriation of 35 gallons a minute (gpm) or less, not to exceed 10 acre-feet a year (ac-ft/yr), except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit.[21]

To obtain a water right for a beneficial use of ground water subject to this exemption, the developer need only file a notice of completion with DNRC within 60 days of completing the well or developed spring.[22]

This exemption, together with DNRC's interpretation of "combined appropriation," has influenced how subdivisions have been developed in Montana, particularly in the fastest growing areas in the western portion the state. DNRC rules provide that a combined appropriation means, "...an appropriation of water from the same source aquifer by two or more groundwater developments, that are *physically manifold into the same system.*"[23] (Emphasis added.) This definition and the exemption allows a subdivision developer to avoid the time and expense of obtaining DNRC and Montana Department of Environmental Quality (DEQ) permits before water can be developed and used.[24] Instead of providing the subdivision with a community water supply and system, the developer can sell lots and leave each purchaser to dig an individual well. Over the last five years, 80% of the lots approved by DEQ were supplied by exempt wells rather than community water systems.[25]

Between July 1, 1973 and September 1, 2007, DNRC issued 104,142 certificates of water rights for exempt ground water developments. Seventy-five percent of all of the 104,142 certificates listed domestic use as the purpose of use.[26] DNRC estimates that by the of end 2007, it will have issued about 40,000 certificates for exempt wells using the 35 gpm/10 ac-ft/yr definition that came into effect in 1991. Over half of the 40,000 will have been issued in Gallatin, Lewis and

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[20] *Clark Fork Basin Watershed Management Plan*, Chapter 6, Hydropower Water Rights and Basin Water Use, pages 73-78, September 2004.

[21] 85-2-306(3)(a) MCA.

[22] 85-2-306(3)(b) MCA.

[23] 36.12.101(14) ARM.

[24] *Water Rights in Montana*, page 18 and 17.38.202(5) ARM.

[25] Private communication from Curt Martin, December 19, 2007.

[26] Martin, pages 1 and 2.

Clark, Missoula, Ravalli, and Flathead Counties, and over 80% will have been issued in just 14 counties, only 3 of which are outside of western Montana.[27] DNRC estimates that if the current ground water permit exemption remains in effect, somewhere between 32,000 and 78,000 additional certificates for exempt wells will be issued by January 1, 2020.

The ground water exemption weakens the prior appropriation system because existing water rights holders have no way to protect their rights against adverse effects from exempt ground water development. Under current law, the holder of a water right is entitled to the same conditions in the source of supply as of the priority date of his or her water right.[28] While an individual 35 gpm/10 ac-ft/yr ground water development may have a negligible impact on a aquifer and surface water connected to it, the impact of multiple exempt wells may be significant. Before DNRC issues a permit to appropriate water or to change an existing water right, it must find that water to support the new or changed use is both physically and legally available and that no existing right would be adversely affected.[29] Existing right holders have the opportunity to object to a permit application to protect their rights. However, because they do not require DNRC permits, exempt ground water users avoid these tests.

The prior appropriation system allocates water based solely on the priority date, the date on which water was first put to a beneficial use for uses prior to the 1973 Water Use Act or on the issuance of DNRC permits after the passage of the Act. The 35 gpm/10 ac-ft/yr ground water has, in effect, established a priority for domestic use that supersedes water right priority dates.

Administrative and Enforcement Challenges

Water is the only natural resource that the state claims to own. According to the Constitution, the purpose of state ownership is to ensure its beneficial use by Montanans. However, the authority of DNRC, the agency assigned with the task of providing for the administration, control, and regulation of water rights, is limited. In his article entitled "Diversion, Ditches, and District Courts" published in *Montana the Magazine of Western History*, Brian Shovers wrote that Montana irrigators historically "... preferred the uncertainty and cost of litigation to established limits imposed by a centralized system." Rather than DNRC, the responsibility for adjudicating and enforcing water rights and resolving water disputes has been "...entrusted to ditch riders, water masters, and district court judges."[30]

In the adjudication process, DNRC's role is limited to examining water rights claims, and placing remarks identifying problems on them. DNRC does not act as an institutional objector, an entity assigned with examining all claims and filing objections to errant claims. Individual water right

[27]The 14 counties are Ravalli, Flathead, Gallatin, Lewis and Clark, Missoula, Yellowstone, Lincoln, Madison, Park, Lake, Jefferson, Carbon, Cascade, and Sanders.

[28]Doney, *Montana Law Handbook*, published by the State Bar of Montana, October 1981, page 75.

[29]DNRC evaluates this test on a calculated rather than a measured basis, i.e., an adverse effect need not be measurable. For example, a small diversion upstream of the hydropower generator may not have a measurable impact on the generator's use of water to produce electricity. However, as long as the hydropower water right holder can show a calculable impact of the diversion, an adverse effect would exist.

[30]Shovers, "Diversions, Ditches, and District Courts," *Montana - The Magazine of Western History*, Spring 2005, page 14.

holders in a given decree bear this burden. In a policy paper discussing the implications of completing the state-wide water rights adjudication, the Upper Clark Fork River Basin Steering Committee wrote, "In larger basins with thousands and in some instances tens of thousands of water rights claims, individual water users cannot be expected to have the knowledge, willingness, and financial resources necessary to scrutinize every claim and to pursue more than a few objections."[31] Ameliorating this concern somewhat is the fact that claims with DNRC issue remarks to which no objections are filed by individual water right holders must be heard before the Water Court. DNRC staff must appear and explain their remarks. The Montana Water Court must address DNRC issue remarks prior to the issuance of final decrees.[32]

DNRC is not the state's water cop. It plays no role in enforcing pre-1973 water rights. Since the passage of the 1973 Water Use Act, it can seek to enforce water right permits by filing actions in district court. However, because of staffing and funding limitations, DNRC has almost never used its authority to go to court.

The enforcement burden falls almost entirely on individual water right holders. Individuals can make calls on junior users and file lawsuits in district court to enforce their water rights. Water users with in an enforceable water rights decree can petition district court to appoint a water commissioner to act as the court's agent and allocate the available supply of water according to the decree water right priority dates. The cost of the water commissioner is borne only by those water users receiving water pursuant to the commissioner's action rather than by all those subject to the decree. Water commissioners generally work only during the irrigation season and are not provided benefits such as health insurance and sick leave. In some areas, finding someone willing to serve as a commissioner has already been a challenge. As local water right decrees are integrated in the adjudication process, enforcing decrees will become more challenging and may involve a hierarchy of commissioners.

DNRC's administrative permit process for obtaining and changing water rights also places a substantial time and cost burden on water users. As is the case with the adjudication process, individual water rights holders have the right to object to permit applications for new or changed uses. Because these objections are heard in a contested case procedure, participants generally choose to be represented by legal counsel. Permit processes often last a year or more.

Because of Montana's reliance on the judicial system and contested case administrative processes, the burden on individual water users to adjudicate, enforce, protect, and make changes to existing rights can literally take years and tens of thousands of dollars. This burden is increasingly problematic for traditional water users such as farmers and ranchers. A right that cannot be defined, enforced, protected, and/or changed, has little or no value.

[31] "White Paper on the Montana Water Rights Adjudication" issued by the Upper Clark Fork River Basin Steering Committee on March 2, 2004, pages 5-6.

[32] *Water Rights in Montana*, page 12-13.

Water administration and management has generally followed a more centralized approach in the other western states than has been the case in Montana.[33] The best example of the centralized model is Wyoming. Article 8, Section 2 of Wyoming's 1889 constitution provides:

> There shall be constituted a board of control, to be composed of the state engineer and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state.[34]

Granting DNRC more authority to administer and enforce water rights could reduce the burden on individual water users. DNRC could be directly authorized to investigate and enforce existing water rights and resolve disputes. It could, for example, hire, train, and provide technical and administrative support to water commissions who would enforce water rights decrees. Given clear criteria for doing so, DNRC could also play a more authoritative role in administration processes reducing the role of objections to speed decisions. Individuals could be allowed to appeal DNRC decisions to district court.

These changes to create a more centralized water right process would require legislation to increase DNRC's authority, staffing and budget. They would also require a greater willingness on the part of individual water right holders to trust and accept a more assertive and instrusive DNRC. Maintaining the existing system with its burden on individual responsibility may come at the cost of an effective loss of water rights by those for whom the time and expense of hiring attorneys and pursuing court action is increasing unaffordable.

Groundwater and Surface Water Interactions

The third factor that is changing the first-in-time, first-in-use, prior appropriation system is the increased acknowledgment of ground and surface water interactions.

As noted above, the Montana Constitution provides that "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." According to DNRC, since passage of the 1973 Water Use Act, "Any person planning new or expanded development for a beneficial use of water from surface or ground water after June 30, 1973, must obtain a Permit to Appropriate Water or file a Notice of Completion of Ground Water Development to get a Certificate of Water Right."[35] These provisions do not necessarily mean that surface and ground water will be administered and managed as a unitary resource. Legislative staff of the Interim Water Policy Committee recently wrote, "Montana law does not provide for conjunctive management or enforcement of surface water and ground water rights."[36]

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[33]Shovers, pages 6-7. Also, see "How Will Completion of the Adjudication Affect Water Management in Montana?" prepared by the Upper Clark Fork River Basin Steering Committee, February 2006, pages 6-9. This paper is available at http://dnrc.mt.gov/wrd/water_mgmt/clarkfork_steeringcomm/completionof_adjud_rpt.pdf.

[34]A copy of the Wyoming Constitution is available at http://soswy.state.wy.us/informat/05Const.pdf.

[35]*Water Rights in Montana*, page 16.

[36]Krista Lee Evans, "A Summary of Montana Water Use Law," page 6, June 2007. This paper is available at http://www.leg.mt.gov/content/lepo/2007_2008/water_policy/staffmemos/waterlawsummary.pdf

Montana basin closure laws did, however, recognize the close relationship between surface and ground water, and defined ground water to mean "...water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately or directly connected to surface water."[37] Because these statutes did not define "immediately or directly connected," DNRC interpreted this phrase to mean "...that a ground water development could not pull surface water directly from a stream or other source of surface water.[38] The Montana Supreme Court invalidated this interpretation in the Montana Trout Unlimited (TU) vs. DNRC case because it "...recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater."[39] This decision halted DNRC processing of water right permit applications in statutorily closed basins incorporating the "immediate and direct" definition of ground water.

In response to this Supreme Court decision, the 2007 legislature passed House Bill 831. HB 831 was entitled:

> "An act revising water laws in closed basins; defining terms in water use laws; amending requirements for an application to appropriate ground water in a closed basin; providing that certain applications to appropriate surface water are exempt from closed basin requirements; providing requirements for hydrogeologic assessments, mitigation plans, and aquifer recharge plans; providing minimum water quality standards for certain discharges of effluent; requiring that previously approved plans that were not located in the Clark Fork basin must meet certain criteria; requiring that data be submitted to the Bureau of Mines and Geology; providing for rulemaking; providing for a case study and requirements and a fee for participation in the case study; recognizing and confirming existing appropriation rights in certain instances; providing an appropriation; amending sections 85-2-102, 85-2-302, 85-2-311, 85-2-329, 85-2-330, 85-2-335, 85-2-336, 85-2-337, 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, 85-2-402, and 85-2-506, MCA; repealing section 85-2-337, MCA; directing the amendment of ARM 36.12.101 and 36.12.120; and providing an immediate effective date and applicability dates an applicability date."

This title befitted the complexity of the legislation's content. HB 831 required an applicant for a new well in a closed basin to provide a hydrologic assessment conducted by a hydrologist, qualified scientist, or qualified licensed professional engineer demonstrating whether the new appropriation would result in a net depletion of surface water. If a net depletion would result, the applicant must also assess whether it would result in an adverse effect on an existing water right. If an adverse effect is predicted, the applicant must file a plan for mitigating that impact. The bill also appropriated $500,000 to MBMG to conduct a case study to determine minimum standards and criteria for the hydrologic assessments.

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[37] See 85-2-342(3) MCA, 2005. This language was included in the basin closure statutes for the Upper Missouri, Teton, Jefferson, Madison, Teton, and Upper Clark Fork River basin closures.

[38] Montana Supreme Court decision in Case Number 05-069, Trout Unlimited vs. DNRC, page 6, April 11, 2006.

[39] Ibid, page 19.

Although the TU vs. DNRC decision and HB 831 apply strictly only to basins closed to most new surface water rights, the requirement to address prestream capture of tributary groundwater, i.e., the interception of ground water that would otherwise flow to a surface water body, and for mitigation plans will undoubtedly be applied to all ground water permitting. DNRC cannot issue a permit for a new water right or a change to an existing right without finding that the new or changed use would not adversely affect any existing right. Applying the adverse effects test to new ground water developments will require assessing prestream capture. Ground water applicants whose development would result in both prestream capture and an adverse affect will likely have the opportunity to offer plans to mitigate it.

DNRC's proposed rules for determining net depletions pursuant to HB 831 require an applicant to determine the "Propagation of drawdown from a well or other groundwater diversion and rate, timing, and location of any resulting surface water depletion effects."[40] Timing is a key issue for managing and enforcing surface and ground water rights in a prior appropriation system. The impacts of ground water development on surface flows may take place over months or years rather than immediately.[41] Although Montana's laws apparently do not provide conjunctive management or enforcement of surface and ground water, neither do they preclude it. As ground water development continues, surface water holders may decide that protecting their rights requires enforcement of their priority dates against wells. Water rights calls on wells have occurred in Idaho to protect surface rights. Montana law allows junior users to defend against calls by seniors if the call would be futile, i.e., that the call would not result in water for use by the senior right holder.[42] How futile calls would be applied to ground water wells with a delayed impact on surface water is not known.

The complexity of ground water development and use and its interaction with surface water does not bode well for the strict application of the prior appropriation doctrine.

Federal Constraints

Water use in Montana is subject not only to state water law, but also to federal statutes, regulations and licenses. Several Montana rivers host dams and reservoirs constructed by the federal government as well as private parties such as investor-owned utilities. The operation of dams and reservoirs and the river flows that they support are affected by laws such as the Endangered Species Act (ESA), the Clean Water Act, and Flood Control Acts, by licenses issued by the Federal Energy Regulatory Commissions, by federal treaties, and by contracts among utilities.[43] These constraints are outside of the state water right framework and, in theory, do not conflict with water rights. However, by requiring reservoir drawdowns, spill at dams, and flow

[40]DNRC, "Notice of Public Hearing On Proposed Amendment in the Matter of the Proposed Amendment of Arm 36.12.101, Definitions and Arm 36.12.120, Basin Closure Area Exceptions and Compliance," August 13, 2007, available at http://dnrc.mt.gov/About_Us/notices/august/36-22-12.pdf.

[41]Need reference to Eloise Kendy paper.

[42]*Clark Fork Basin Watershed Management Plan*, Chapter 4, Legal Framework for Water Management, page 66, September 2004.

[43]For specific examples of such constraints applicable to the Clark Fork River Basin, see *Clark Fork Basin Watershed Management Plan*, Chapter 5, Legal and Regulatory Constraints to Water Management, pages 68-72, September 2004.

augmentation measures, these requirements may affect the physical and/or legal availability of water. Because of the Supremacy Clause of the United States Constitution, conflicts between implementation of federal statutes and state law are likely to be resolved in favor of federal obligations.

The operation of Hungry Horse and Libby dams in the Clark Fork River basin are illustrative. Both are subject to requirements resulting from the listing of anadromous fish stocks downstream in the Columbia Basin. As a result of litigation, a United States District Judge has rejected the 2000 and 2004 biological opinions for the Federal Columbia River Power System written by the National Marine Fisheries Service (NMFS) to satisfy the legal requirements of the ESA. In the absence of an acceptable biological opinion, this judge has adopted specific requirements for the operation of the Columbia River dams, including Hungry Horse and Libby, addressing reservoir drawdowns, spill, and flow augmentation. The judge has recently written that should NMFS fail again to produce an acceptable biological opinion, he may issue a "...permanent injunction directing the Federal Defendants to implement additional spill and flow augmentation measures, to obtain additional water from the upper Snake and Columbia River, or to implement reservoir drawdowns to enhance in-river flows."[44] Because the Libby and Hungry Horse reservoirs are two of the four largest storage reservoirs in the Columbia River basin, these spill, flow, and drawdown measures may limit the water available from them for use by Montana water users. ESA and other constraints also exist east of the Continental Divide in the Missouri River basin.

Summary

Discussions of Montana water law assume that it is governed by the doctrine of prior appropriation, first-in-time, first-in-use. As this paper has shown, forces are eroding the effect of this doctrine. The era in which new and expanded water uses are provided via new surface water rights is essentially over. The growing development of ground water and recent court rulings and legislation increases both the importance and complexity of managing ground and surface water interactions. The ground water permit exemption and DNRC's interpretation of combined appropriations of ground water has in effect created a domestic use exemption from prior appropriation law. The burden measured in time and dollars on individual water right holders to define, enforce, protect, and/or change water rights threatens the viability of the rights themselves. In addition, federal laws, regulations and licenses increasingly constrain water management and use outside the framework of state water law.

[44] James A. Redden, United States District Judge, District of Oregon, memorandum to Counsel of Record in Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., CV 01-640 RE, and American Rivers v. NOAA Fisheries, CV 04-00061 RE, December 7, 2007.